1997

State of Utah v. John D. Hawkins : Reply Brief

Utah Court of Appeals

Edward R. Montgomery; Richard A. Van Wagoner; Snow, Christensen & Martineau; Counsel for Appellant.

J. Frederic Voros, Jr.; Assistant Attorney General; Jan Graham; Utah Attorney General; Cy Castle; Deputy Salt Lake District Attorney; Counsel for Appellee.

Edward R. Montgomery Utah Bar No. 7583 136 South Main, Suite 404 Salt Lake City, Utah 84101 (801)359-2368 Richard A. Van Wagoner Utah Bar No. 4690 Snow, Christensen & Martineau 10 Exchange Place, 11th Floor Post Office Box 45000 Salt Lake City, Utah 84145 (801) 521-9000 Counsel for Appellant

Frederick J. Voros, Jr. Assistant Attorney General 160 East 300 South #600 Salt Lake City, Utah 84114 Counsel for Appellee

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee,

v.

JOHN D. HAWKINS,

Defendant and Appellant.

Appellate Court No. 970398-CA

Priority 2

REPLY BRIEF OF APPELLANT

On Appeal from Decision of the Third District
Court of Salt Lake County, State of Utah,
Honorable Homer F. Wilkinson Presiding

Edward R. Montgomery
Utah Bar No. 7583
136 South Main, Suite 404
Salt Lake City, Utah 84101
(801)359-2368

Richard A. Van Wagoner
Utah Bar No. 4690
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
Post Office Box 45000
Salt Lake City, Utah 84145
(801) 521-9000
Counsel for Appellant

Frederick J. Voros, Jr.
Assistant Attorney General
160 East 300 South #600
Salt Lake City, Utah 84114
Counsel for Appellee

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee,

v.

JOHN D. HAWKINS,

Defendant and Appellant.

Appellate Court No. 970398-CA

Priority 2

REPLY BRIEF OF APPELLANT

On Appeal from Decision of the Third District
Court of Salt Lake County, State of Utah,
Honorable Homer F. Wilkinson Presiding

Edward R. Montgomery
Utah Bar No. 7583
136 South Main, Suite 404
Salt Lake City, Utah 84101
(801)359-2368

Richard A. Van Wagoner
Utah Bar No. 4690
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
Post Office Box 45000
Salt Lake City, Utah 84145
(801) 521-9000
Counsel for Appellant

Frederick J. Voros, Jr.
Assistant Attorney General
160 East 300 South #600
Salt Lake City, Utah 84114
Counsel for Appellee

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Page

Cases

Rules

III. ARGUMENT

A. The State's Assertion that Appellant did not Marshal the Evidence is Both Without Merit and not Properly Before the Court.

1. Appellant's Recitation of Facts Fairly and Accurately sets Forth All Facts upon Which the Jury Could Have Based its Decision.

The claim that Appellant did not marshal the evidence is incorrect. The State claims Appellant failed to explain that "defendant's arrangement with Tim Markham was month-to-month . . . ." Br. Appellee, at 14. Appellant specifically set forth that fact in footnote 1 of his initial Brief. The State next contends Appellant did not include the fact that, "defendant paid no rent for December 1995 or January 1998." Id. However, as the State notes earlier in its Brief, "Defendant did not pay . . . *and does not claim to have paid, for the months of December 1995 or January 1996.*" Br. Appellee, at 10 (emphasis supplied). The State claims Appellant ignored the fact that Mr. Hawkins, "just disappeared for two or three months . . ." Br. Appellee, at 14. Appellant clearly stated, "[Mr. Hawkins] seemed to disappear near the end of October." Br. Appellant, at 9. The State asserts Appellant ignored an exchange between Mr. Hawkins and Mr. Severns stating: "at the time, defendant asked Severns what he was doing there, a question that Severns found unusual." Br. Appellee,

at 15. Appellant specifically referenced this same exchange: "Mr. Hawkins asked Mr. Severns what he was doing there, and Mr. Severns asked the same of Mr. Hawkins." Br. Appellant, at 10. Finally, the State argued Appellant ignored the admission that Mr. Hawkins "entered both units and . . . 'did what I had to do.'" Br. Appellee, at 15. Again, it is the State that recognizes, "Defendant admits he entered the units around 4 a.m." Br. Appellee, at 20 (citing Br. Appellant, at 32). Thus, the State's contention that Appellant ignored or overlooked these facts is an unfair characterization.

The remaining four facts the State claims were ignored are either irrelevant or false. For example, the State cites a discussion between Gloria Markham and Jack Carlton where Mr. Carlton said he might know who took the Markhams' tools. Br. Appellee, at 15. This evidence could support a finding that Mr. Hawkins entered the units and that he committed the theft. Of course, Mr. Hawkins admits to entering the property, *see*, Br. Appellee, at 20, and theft is not an issue on appeal.[1] Accordingly, Mr. Carlton's thoughts about whom he suspected in the

[1]Although Mr. Hawkins denied having stolen any property, he chose not to appeal the conviction for theft because there was some evidence supporting that Count.

theft is irrelevant. The State also cites Mr. Markham's comment that Mr. Hawkins "evicted himself by not showing." Br. Appellant, at 14. That comment is a legal conclusion and an incorrect legal conclusion, and what Mr. Markham considered to be the state of the law at the time of the trial is irrelevant. The State also notes that after the theft occurred, Mr. Hawkins lied to the investigating officer. That assertion has no bearing on whether Mr. Hawkins committed an unlawful entry.

Finally, the State's claim that Mr. Markham changed all the locks is untrue. A cursory review of the facts set forth in the State's Brief shows that Mr. Markham did not change either lock on Unit 98. Each Unit had an outside and an overhead door. Tr. Vol. 1, at 101, 195. The State notes that Tim Markham was unable to change the lock securing the side door to Unit 98. Br. Appellee, at fn. 5. The State also notes, "[b]ecause some rollers were missing from the overhead door of unit 98, Tim Markham used vise grips to lock the door from the inside." Br. Appellee, at 4. The State's own version of the facts establishes that condition existed on the night in question. Tr., Vol. 1, at 147-78. The State's own recitation of the facts shows that Mr. Markham did not change the lock on the side door and did not

change the locking system on the overhead door. Therefore, Mr. Markham did not change either of the locks on unit 98. The suggestion that the exclusion of that "*fact*" was somehow improper is erroneous because the assertion is untrue.

2. The State's Marshaling Argument is not Properly Before the Court.

The Court should not consider the merits of the State's marshaling "argument" because it is not presented properly. Utah Rule of Appellate Procedure 24(b) requires the Brief of Appellee to conform with Rule 24(a)(9). That Rule requires Appellee to state its contentions and the reasons supporting its position. Under that Rule, Utah Appellate Courts have consistently refused to consider argument when a party fails to offer sufficient analysis and authority in support of its position. State v. Wareham, 772 P.2d 960, (Utah 1989); State v. Bishop, 753 P.2d 439, 450 (Utah 1988); State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984); State v. Farrow, 919 P.2d 50, n.1 (Utah App. 1996); State v. Streeter, 900 P.2d 1097, n.3 (Utah App. 1995); State v. Jennings, 875 P.2d 566, n.3 (Utah App. 1994); State v. Price, 827 P.2d 247, 250 (Utah App. 1992); State v. Day, 815 P.2d 1345, 1351 (Utah App. 1991); State v. Cayer, 814 P.2d 604, 613 (Utah App. 1991); State v. Sterger, 808 P.2d 122, n.2 (Utah App. 1991); State v. Pascoe, 774 P.2d 512, n.1

(Utah App. 1989); *Cf.* West Valley City v. Majestic Inv. Co., 818 P.2d 1311 (Utah App. 1991) (a party cannot present a laundry list of the evidence and leave for the court the burden of determining what facts are relevant to satisfy its burden to marshal) (citing, Heinecke v. Dept. Of Commerce, 810 P.2d 459 (Utah App. 1991)). The driving force behind the rule is that "[a] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." Bishop, 753 P.2d at 450.

Here, the State's two conclusions and a list of ten citations to the record do not satisfy the requirements of Rule 24(b) because they leave the burden of argument with the Court. The State's "argument" that Appellant did not marshal literally consists of 1) a statement that Appellant did not marshal, 2) a list of ten things it claims Appellant did not cite in his brief, and 3) a recitation that Appellant did not marshal. Br. Appellee, at 14-15. There is no argument. The State does not explain why or even whether those portions of the record could have been remotely important or whether the jury could have based its conclusion on those facts. In sum, the claim that Appellant failed to marshal is not supported

by any legal reasoning or analysis and, therefore, does not conform with Rule 24(b).

B. The Markhams did not Terminate Mr. Hawkins' Leasehold Interest.

At trial, and now on appeal, the State failed to offer facts which would have been legally necessary in order to reach a conclusion that Mr. Hawkins' leasehold interest had terminated prior to when the alleged crime occurred. Moreover, the Markhams acted in a manner that was inconsistent with the suggestion that they intended to terminate the Lease.

1. The Facts as Alleged by the State do not Support a Legal Conclusion that the Markhams Terminated Mr. Hawkins' Lease.

The facts elicited at trial are legally insufficient to show the Markhams terminated Mr. Hawkins' Lease. Once a person is granted permission to enter a property, an unlawful entry can occur only if that permission is revoked. People v. Barefield, 804 P.2d 1342, 1345 (Colo. App. 1990) (citing People v. Carstensen, 420 P.2d 820 (Colo. 1966)). Mr. Hawkins had a lawful right to enter because he had a Lease which was never terminated. The State does not argue the Lease granted Mr. Hawkins the license, right and privilege to enter. The State argues that at some point prior to when the alleged crime took place the Lease had terminated, thereby

revoking Mr. Hawkins' license to enter. This argument fails because the Markhams' acts and omissions were insufficient as a matter of law to terminate the Lease.

The facts the State cites in support of its argument do not support its conclusion. First, the State's reliance on Mr. Hawkins' actions are misplaced. The State supports its argument with the facts that Mr. Hawkins 1) did not pay rent 2) was not forthright with the police when confronted, 3) did not claim his right to enter was based on the Lease when questioned by the police, and (4) did not claim his right to enter was based on the Lease when he testified at trial. Br. Appellee, at 15-16. Each of these facts is irrelevant. Only the Markhams had the authority to exclude Mr. Hawkins from the property. What Mr. Hawkins did, or did not do, as a matter of law, could not infringe upon the Markhams' exclusive right to control their property. Thus, reliance on Mr. Hawkins' actions is inappropriate. Furthermore, the existence of the Lease depends exclusively on the events which occurred before the entry. What happened after the fact is irrelevant.

The only other facts the State cites in support of its position are, 1) Mr. Markham changed the locks and re-rented the

space, and 2) the Lease automatically expired when Mr. Hawkins "disappeared." Id. Reliance on these "facts" is improper because they do not exist as evidence in this case. First, Mr. Markham did not change the locks as the State claims. See, section III(A)(1), supra. Second, it does not follow from the record that the Lease automatically terminated. The terms of the Lease agreement were, "you pay you stay. You don't you go." Tr., Vol. 1, at 136, 169. The record is clear that Mr. Hawkins was never timely with his rent. According to Mr. Markham, Mr. Hawkins paid, "a little bit here and there, you know." Tr., Vol. 1, at 157. "[Mr. Hawkins] was supposed to be renting [unit 98], but you know, whether I got it or whether I didn't get it; I would chase him around until the 15th or 20th of the month trying to get money out of him, you know." When asked if Mr. Hawkins made the rent payment as agreed, Mr. Markham responded, "[a]s far as I know he made a couple." Tr., Vol. 1, at 169. Mr. Hawkins was chronically late with his rent, if he made it at all. The record does not suggest anyone considered the "you pay you stay" Lease terminated simply because Mr. Hawkins was untimely with rent. Accordingly, the State's conclusion that Mr. Hawkins' late rent automatically terminated the Lease is not reasonably based in the evidence.

In this case, the record shows the Markhams did not evict Mr. Hawkins or inform him in any way that he was unwelcome. Br. Appellee, at 17. The record also shows the Markhams did not retake the property, remove Mr. Hawkins' belongings from the units or take any other action to put Mr. Hawkins on notice his Lease was terminated. In short, the record offers no support to the State's claim that the Markhams terminated the Lease agreement they had with Mr. Hawkins.

2. Markhams Elected to Leave Mr. Hawkins in Possession of the Property Rather than Terminate the Lease.

Contrary to what the State suggests, the Markhams did not terminate Mr. Hawkins leasehold interest. Instead, at worst for Mr. Hawkins, the Markhams treated the Lease as modified to a storage arrangement so they could charge Mr. Hawkins storage fees. Between November 1, 1995 and at least January 29, 1996, the Markhams charged Mr. Hawkins rent for the use of the units to store Mr. Hawkins' property. State's Exhibit 8. On January 29, 1996, Gloria Markham wrote Mr. Hawkins a letter explaining that she was charging Mr. Hawkins a storage fee of $16.00 per day for storing his belongings in the units. Id. Those charges began accruing on November 1, 1995, and were to continue until such time as Mr. Hawkins or Mr. Carlton removed Mr. Hawkins' remaining

possessions. As of January 29, 1996, Mr. Hawkins had a storage bill of $1,440.00. That sum includes a $16.00 fee for the date the alleged crimes occurred.

The Markhams were faced with a decision when Mr. Hawkins did not pay rent for December 1995 and January 1996: evict Mr. Hawkins from the property and lose the right to collect rent or, let Mr. Hawkins store his property in the units and charge him a storage fee. They unequivocally chose the later. The benefit the Markhams wanted was $16.00 a day for rent. The burden they accepted was to grant Mr. Hawkins the license to access his property. Simply because the Markhams became unhappy with their bargain is not sufficient justification to ignore the legal consequence of their choice.

By treating the Lease as one for storage the Markhams did not divest Mr. Hawkins of his license to enter. At best, the election changed the nature of the agreement from one where Mr. Hawkins used the shops to perform auto-body repair to one where Mr. Hawkins used the space to store and access his belongings for a lesser fee. By changing the nature of the Lease, Mr. Hawkins still had a lawful right to access his property which was stored in the units, and, as

noted above, the license and privilege to enter were never otherwise terminated.

C. The Markhams did not Restrict the Scope of Mr. Hawkins' License to Enter as the State now Contends.

The State does not contest the Markhams' invitations gave Mr. Hawkins a lawful right to enter units 98 and 99. Rather, the State argues Mr. Hawkins' entry was unlawful because his entry somehow exceeded the scope of his license to enter. According to the State, when the Markhams told Mr. Hawkins to "[c]ome get your shit," the Markhams "intended" and Mr. Hawkins "understood" that Mr. Hawkins could return to the complex only during "normal business hours" and under the Markhams supervision. Br. Appellee, at 17. There are no facts upon which such inferences could have arisen.

The State's reasoning is based on the false premise that the record supports a finding that any restrictions ever existed. In order to sustain a burglary conviction on the theory that the accused committed an unlawful entry by exceeding the scope of his license or privilege to enter, the State must affirmatively prove the scope of the license and how it was exceeded. State v. Harper, 785 P.2d 1341 (Kan. 1990), People v. Rider, 307 N.W.2d 690 (Mich.

1981), People v. Woolsey, 322 N.E.2d 614 (Ill 1975), State v. Starkweather, 297 P. 497 (Mont. 1931).

In Woolsey, for example, the defendant was charged with committing a burglary of the warehouse were he worked. Woolsey, 322 N.E. 2d, at 614. Defendant argued he could not have committed an unlawful entry because he was an employee with a key to the warehouse and, therefore, had license and privilege to enter. Id. at 615. In support of its case the State showed that employees were authorized to enter the warehouse only during business hours as defined by the company. Id. at 615. The only exception to that rule was if an employee worked past closing time, he could enter the warehouse to return a vehicle or materials. On the day of the alleged crime, all employees were required to return to the warehouse early because of bad weather. Accordingly, no one would have been working past closing. The warehouse later closed at 5:00 p.m. and no employees would have had reason or authority to enter the warehouse until the next day. Thereafter, the defendant entered the warehouse and committed a theft. The Court affirmed the conviction, holding that "the evidence in the instant case does support the conclusion that defendant's authority to enter the Gersman and Company building was limited to those occasions -- both

time and purpose -- where necessary to further the employee's activities." Id. at 617. There is no analogous showing in this case; the employee was not leasing space in the warehouse or storing his property there for a fee and Mr. Hawkins was not an employee of the Markhams nor subject to their supervision.

In this case, the State's argument that Mr. Hawkins' entry exceeded the scope of the permission fails for two reasons. First, the State failed to offer sufficient evidence establishing that any limitations were placed on Mr. Hawkins' entry. Second, even if these limitations existed, the State failed to offer any evidence defining the scope of the limitations.

The State apparently argues Mr. Hawkins' license to enter the complex was limited to "business hours" when the Markhams were present. Br. Appellee, at 17. However, the record contains no evidence those restrictions exist. Certainly no one told Mr. Hawkins he could enter only during "business hours," nor did anyone tell Mr. Hawkins he could remove his belongings only under the Markhams' supervision. Indeed, there is no evidence, stated or implied, that the Markhams wanted or even considered such a restriction. Examination of the record in this case shows the only place where such restrictions are mentioned is in State's brief.

Furthermore, even if the State had established Mr. Hawkins was allowed to enter only during "business hours," the State did not show, and indeed does not even attempt to show, what "business hours" where. If the State now wants to argue its case based on the premise that Mr. Hawkins' license was limited to "business hours" the State carries the burden to prove when business hours were. It did not do so and there is no evidence upon which such a showing can be made. The State did not offer any evidence to establish when "business hour" were; therefore, it cannot prevail on a theory that Mr. Hawkins entered the complex outside of those hours.

The State's suggestion that Mr. Hawkins entered outside "business hour" is further undercut by the record showing either there were no "business hours" or "business hours" were unlimited. Mr. Markham worked in the units "seven days a week if he had to" and at times would stay "until after midnight." Tr., Vol. 1, at 147. Furthermore, he allowed Mr. Hawkins to "just come and go. If he was there, he was there. If he wasn't, he wasn't." Tr., Vol. 1, at 138. Mr. Markham also testified Mr. Hawkins often stayed through the night at the shop. Id. The only reasonable

inference is there were no defined "business hours" at the shop, or that all hours were "business hours."

The Markham did not evict Mr. Hawkins, did not tell him he was no longer welcome, did not change the locks, and did not remove Mr. Hawkins' belongings from the property. The Markhams did, however, charge Mr. Hawkins rent for using the units to store his property and repeatedly urged and invited Mr. Hawkins to the units to remove that property. Assuming Mr. Hawkins removed some of Mr. Markhams' property along with his own would make Mr. Hawkins a thief, but not a burglar.

IV. CONCLUSION

For these reasons, and those set forth in Appellant's Opening Brief, the conviction for burglary should be overturned.

DATED this 17th day of April, 1998.

Attorneys for Appellant

Edward R. Montgomery

SNOW, CHRISTENSEN & MARTINEAU

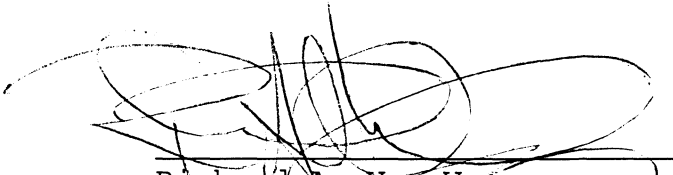
By: Richard A. Van Wagoner

N:\19209\1\REPLY.BRF

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 17 day of April, 1998, I caused two (2) copies of the foregoing **Reply Brief of Appellant** to be served by first-class mail upon the following party:

Frederick J. Voros, Jr.
Assistant Attorney General
160 East 300 South, Suite 600
Salt Lake City, Utah 84114
Counsel for Appellee



Richard A. Van Wagoner